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FILED
MAR 19 20
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CAPITAL CASE – EXECUTION DATE: 4/10/02 1:00 a.m.

No. 01-9094

IN THE

Supreme Court of the United States

Abu-Ali Abdur'Rahman,
Petitioner,

v.

Ricky Bell, Warden,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 18, 2002

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QUESTIONS PRESENTED

The district court in this case held that it was powerless to consider many of Petitioner's federal habeas claims because they had not been sufficiently presented in a petition for discretionary review to the Tennessee Supreme Court. The district court granted Petitioner relief as to other claims in a ruling that was later reversed on appeal. While the appeal was pending, however, the Tennessee Supreme Court issued Rule 39 ("TN Rule 39"), which on its face applies to Petitioner's case, and which expressly "clarif[ies]" that such a discretionary application is *not* required for "exhaustion of state remedies for federal habeas corpus purposes." Petitioner's claims thus had properly been exhausted. See *Randolph* v. *Kemna*, 276 F.3d 401 (CA8 2002) (applying similar Missouri rule); *Swoopes* v. *Sublett*, 196 F.3d 1008 (CA9 1999) (Arizona), *cert. denied*, 529 U.S. 1124 (2000).

The Sixth Circuit nonetheless categorically refused to permit the district court to consider TN Rule 39 and thus to consider the merits of the claims the district court had erroneously held to be defaulted. Petitioner moved in the district court for relief from judgment pursuant to Fed. R. Civ. P. 60(b), but the court of appeals held that every such motion is prohibited as a matter of law as a "second or successive" habeas application. In addition, before the mandate issued in the prior appeal, Petitioner separately moved in the court of appeals for a remand so the district court could apply TN Rule 39. But the court of appeals refused, notwithstanding that Petitioner would otherwise be prohibited from receiving any adjudication of his constitutional claims on the merits and would be executed as a result.

The Questions Presented are:

1. Whether the Sixth Circuit erred in holding, in square conflict with decisions of this Court and of other circuits, that every Rule 60(b) Motion constitutes a prohibited "second or successive" habeas petition as a matter of law.

2. Whether a court of appeals abuses its discretion in refusing to permit consideration of a vital intervening legal development when the failure to do so precludes a habeas petitioner from ever receiving any adjudication of his claims on the merits.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Abu-Ali Abdur'Rahman (hereinafter, "Petitioner") respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

This Petition seeks review of two judgments of the Sixth Circuit. See S. Ct. R. 12.3. The judgments are embodied in a single unpublished Order (Pet. App. B1-B2) incorporating a prior unpublished Order (*id.* A1-A3). The district court's orders (Pet. App. C1-C3, D1-D2) are unpublished. The district court's prior opinion granting Petitioner a writ of habeas corpus and vacating his death sentence (Pet. App. E1-E59) is published at 999 F. Supp. 1073. The Sixth Circuit's divided opinion reversing (*id.* F1-F47) is published at 226 F.3d 696.

JURISDICTION

Petitioner filed a motion for relief from judgment in the district court pursuant to Fed. R. Civ. P. 60(b) (the "Rule 60(b) Motion"). The district court transferred the case to the Sixth Circuit pursuant to 28 U.S.C. 1631. The court of appeals then denied Petitioner relief on February 11, 2002.[1]

Petitioner furthermore seeks review of the Sixth Circuit's denial of rehearing and rehearing *en banc*, embodied in the same February 11 Order, to remand Petitioner's prior appeal. See Pet. App. B2. Cf. *Calderon* v. *Thompson*, 523 U.S. 538 (1998) (reviewing court of appeals' decision to grant such relief).

This Court has jurisdiction over the Sixth Circuit's judgments and orders pursuant to 28 U.S.C. 1254(1). See generally *Hohn* v. *United States*, 524 U.S. 236 (1998) (describing the broad categories of cases reviewable in this Court).

STATUTE AND RULE INVOLVED

28 U.S.C. 2244(b), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, provides:

> (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) The applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
>
> (3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
>
> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application satisfies the requirements of this subsection.

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[1] Petitioner specifically seeks review of the Sixth Circuit's *predicate* determination, embodied in a final order in this case as set forth in the February 11, 2002 Order, that Petitioner's Rule 60(b) Motion is a "second or successive" habeas application. Petitioner does not seek review of the Sixth Circuit's gatekeeping ruling denying him "authorization" to file a "second or successive" application on the ground that he had failed to satisfy the criteria of 28 U.S.C. 2244(b)(1) & (2). See 28 U.S.C. 2244(b)(3)(E). If this Court determines it lacks jurisdiction to grant this Petition, it should grant his parallel Petition for an original writ of habeas corpus pursuant to *Felker* v. *Turpin*, 518 U.S. 651 (1996). See No. 01-___, *In re Abdur'Rahman*.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

Fed. R. Civ. P. 60(b) provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

STATEMENT OF THE CASE

The district court in this case refused to consider many of Petitioner's federal constitutional claims (including serious claims of prosecutorial misconduct) on the merits because they were not presented in a petition for discretionary review to the Tennessee Supreme Court. The district court thus applied a presumption that, because the Tennessee Supreme Court had not stated to the contrary, such an application was both an available form of relief for a state prisoner such as Petitioner and necessary to exhaust state remedies. Pet. App. E15-E16. Accord *O'Sullivan* v. *Boerckel*, 526 U.S. 838 (1999). Before the judgment on Petitioner's habeas petition became final, however, the Tennessee Supreme Court issued its Rule 39 ("TN Rule 39"), which provides that such a discretionary application is *not* required for "exhaustion of state remedies for federal habeas corpus purposes." TN Rule 39 furthermore applies to Petitioner's case, as it explicitly "clarif[ies]" existing law and expressly applies "[i]n *all appeals from criminal convictions or post-conviction matters from and after July 1, 1967*" (emphasis added). The Sixth

Circuit, however, refused to permit the district court to apply TN Rule 39 either (a) pursuant to a motion for relief from judgment under Fed. R. Civ. P. 60(b), or (b) by remanding the case (which had not yet become final) to the district court for application of TN Rule 39. See Pet. App. A1-A3, B1-B2.

I. State Court Proceedings

In July 1987, Petitioner was convicted in Tennessee of first-degree murder and sentenced to death. His conviction and death sentence were affirmed on direct appeal to the Tennessee Supreme Court. *State* v. *Jones*, 789 S.W.2d 545 (Tenn.), *cert. denied*, 498 U.S. 908 (1990).

Petitioner pursued state post-conviction relief, in which he asserted a number of claims, including claims of ineffective assistance of counsel and prosecutorial misconduct at both the guilt and sentencing stages of the case. In August 1993, the trial judge issued a decision denying Petitioner's claims for post-conviction relief. Petitioner filed an appeal as of right from the trial court's decision to the Tennessee Court of Criminal Appeals. In his appeal as of right, Petitioner presented his ineffective assistance of counsel claims and his prosecutorial misconduct claims, as well as other claims. The Tennessee Court of Criminal Appeals affirmed the trial court's denial of Petitioner's petition for post-conviction relief. *Jones* v. *State*, No. 01C01-9402-CR-00079, 1995 Tenn. Crim. App. LEXIS 140 (Tenn. Crim. App. Feb. 23, 1995).

Petitioner filed an Application for Permission to Appeal to the Tennessee Supreme Court. Although this Application presented Petitioner's ineffective assistance of counsel claims and certain other claims, this Application did not set forth the bulk of Petitioner's prosecutorial misconduct claims. The Tennessee Supreme Court denied this Application without discussion. *Jones* v. *State*, No. 01C01-9402-CR-00079 (Tenn., filed Aug. 28, 1995). This Court denied certiorari. 516 U.S. 1122 (1996).

II. Petitioner's Application For A Writ Of Habeas Corpus

On February 23, 1996, Petitioner filed a petition in federal district court for a writ of habeas corpus pursuant to 28 U.S.C. 2254.[2] As a threshold matter, however, the district court accepted Respondent's argument "that the [c]ourt should not reach the merits" of many of Petitioner's claims because, although Petitioner had presented those claims to the Tennessee Court of Criminal Appeals, he had failed to present them sufficiently in his application for discretionary review to the Tennessee Supreme Court. Pet. App. E6. The district court specifically acknowledged the "split of authority" in the circuits that then existed over whether a claim must be presented to a state's highest court in order to be deemed properly exhausted, but the court nonetheless considered itself bound by the Sixth Circuit's prior holding "that a petitioner must seek discretionary review." *Id.* E9-E10. The Sixth Circuit's rule thus created, and the district court applied in this case, a default presumption that (absent a contrary statement by the state supreme court) a petition for discretionary review is an available and necessary means of exhausting state remedies. *Id.* E15-E16. The district court accordingly concluded that Petitioner had "failed to exhaust" most of his claims and that, "because Petitioner has no remedy currently available in state court, these claims are procedurally defaulted." *Id.* E16. In particular, the district court held that the great majority of Petitioner's prosecutorial misconduct claims were defaulted on this basis. *Id.* E12-E16. See also *infra* at 28 (detailing why Petitioner's claims raise grave doubts about his sentence, including misconduct claims involving the prosecutor in this case, who has been *repeatedly* sanctioned for gravely unethical misconduct in other matters).

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[2] The trial court proceedings in this case are accordingly not governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). See *Lindh* v. *Murphy*, 521 U.S. 320 (1997).

The district court held that Petitioner's claim of ineffective assistance by his state trial counsel, by contrast, had been fully presented to the Tennessee Supreme Court and thus could be considered on its merits. The district court conducted an extensive evidentiary hearing and found an egregious constitutional violation at sentencing because Petitioner's counsel had failed to introduce *any* of the "abundan[t]" available mitigation evidence. Pet. App. E3. The court found it inescapable that petitioner's counsel "utterly failed in their duty to adequately represent their client, who, as a result of this miscarriage of justice, was unconstitutionally sentenced to death. This is not a case of harmless error." *Id.* E57.

On Respondent's appeal, a divided panel of the Sixth Circuit reversed. Although the court of appeals rejected Respondent's only argument on appeal – that the district court lacked authority to create an evidentiary record – two members of the court *sua sponte* overturned the district court's factual finding of prejudice with only two sentences of explanation. See Pet. App. F21 The Sixth Circuit denied rehearing and rehearing *en banc* (*id.* G1) by divided votes, but granted a stay of its mandate pending the disposition of Petitioner's petition for a writ of certiorari (hereinafter, "the 2001 Cert. Petition"). Respondent opposed review in this Court principally on the ground that the questions presented by the 2001 Cert. Petition were fact-bound, and this Court subsequently denied certiorari. No. 00-1742, 122 S. Ct. 368 (2001).

III. Proceedings Relating To Tennessee Supreme Court Rule 39

1. While the district court's decision granting Petitioner a writ of habeas corpus was pending on appeal, the Tennessee Supreme Court promulgated that Court's Rule 39 (hereinafter, "TN Rule 39"). The Rule establishes beyond peradventure that the default presumption, applied by the district court in this case, that a petition for discretionary review is an available and necessary means of exhausting all state remedies in Tennessee is *not correct*. The express

purpose of Rule 39 is thus "to clarify that denial of relief by the Court of Criminal Appeals shall constitute exhaustion of state remedies for federal habeas corpus purposes." The Rule provides:

> [A] litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all state remedies available for that claim.

Particularly vital for the purposes of this case, TN Rule 39 on its face encompasses Petitioner's case – it avowedly seeks to "clarify" existing law, and expressly applies "[i]n *all appeals* from criminal convictions or post-conviction matters *from and after July 1, 1967*" (emphasis added).[3]

2. Petitioner moved in the district court for relief from judgment under Fed. R. Civ. P. 60(b) to have the claims previously held defaulted, including particularly the prosecutorial misconduct claims (hereinafter, "the TN Rule 39 Claims"), decided on the merits. Petitioner asserted that, under TN Rule 39, he had exhausted his claims. As other circuits have concluded with respect to similar statutes, such a state rule satisfies the exhaustion requirement. See *Randolph* v. *Kemna*, 276 F.3d 401 (CA8 2002) (so holding in case applying parallel Missouri Supreme Court Rule to holding of *O'Sullivan* v. *Boerckel*, 526 U.S. 838 (1999), that, unless state law is to the contrary, exhaustion requires that claims be presented in petition to state supreme court for discretionary review); *Swoopes* v. *Sublett*, 196 F.3d 1008 (CA9 1999) (same with respect to exhaustion in Arizona, on remand for reconsideration in light of *O'Sullivan*), *cert. denied*, 529 U.S. 1124 (2000).

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[3] Respondent nonetheless argued in the district court that TN Rule 39 only applies to state court appeals completed after the Rule's effective date. That state-law question is presently pending before the Sixth Circuit in another case, No. 00-6575, *Adams* v. *Holland*. Because this Petition argues only that the district court was not barred from considering Petitioner's Rule 60(b) Motion – and thus was not barred from considering the effect of TN Rule 39 – no question of state law is a predicate to deciding the question presented.

Petitioner specifically explained that his Rule 60(b) Motion did not constitute a "second or successive" habeas corpus petition, particularly because he was not raising any new claims, facts, or evidence and because the district court had not previously decided the TN Rule 39 Claims "on the merits." As Respondent later candidly admitted in the Sixth Circuit: "Appellant has *not* presented any new 'claim' for habeas corpus relief." Response To, *Inter Alia*, "Appeal From Denial Of Motion For Relief From Judgment Under Fed. R. Civ. P. 60(b)" 6 (Dec. 19, 2001) (emphasis added). In support, Petitioner invoked the Second Circuit's square holding in *Rodriguez* v. *Mitchell*, 252 F.3d 191 (2001), that, as a matter of law, a Rule 60(b) Motion is *not* a "second or successive" petition.

In his response to the Rule 60(b) Motion, Respondent did not address whether Petitioner was entitled to relief on the TN Rule 39 Claims. Rather, Respondent principally argued that the Rule 60(b) Motion was an improper "second or successive" habeas petition. Respondent acknowledged the Second Circuit's square holding in *Rodriguez* but maintained that *Rodriguez* was irrelevant because the Sixth Circuit had explicitly adopted a contrary rule, "agree[ing] with those Circuits that have held that a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition.'" Resp. D. Ct. Br. 3 (quoting *McQueen* v. *Scroggy*, 99 F.3d 1302, 1335 (1996)).[4]

The district court agreed with Respondent that it was powerless to consider Petitioner's Rule 60(b) Motion, and therefore was powerless to consider the TN Rule 39 claims on the merits. At the outset, the court *acknowledged* that Petitioner would be entitled to relief in the Second Circuit because, "[i]n *Rodriguez*, the Second Circuit held 'a Motion under Rule 60(b) to

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[4] As this Petition explains *infra* at 14-18, in reality, other circuits manifestly *do not* agree that a Rule 60(b) motion is, in this context, a "second or successive" habeas application.

vacate a judgment denying habeas is not a second or successive habeas petition and should therefore be treated as any other motion under Rule 60(b).'" Pet. App. C2-C3 (quoting 252 F.3d at 198). But the court deemed itself bound to follow the Sixth Circuit's contrary rule that "the Rule 60(b) Motion must be construed as an attempt by the petitioner to file a second or successive petition." *Id.* (citing *McQueen*, *supra*).

3. Under Sixth Circuit precedent, when a district court is presented with a "second or successive" habeas application, it must transfer the case to the Sixth Circuit pursuant to 28 U.S.C. 1631 for that court to apply the gatekeeping criteria of 28 U.S.C. 2244(b)(1) & (2). See *In re Sims*, 111 F.3d 45 (1997). The district court in this case applied that rule and entered a transfer order. Pet. App. C3. Petitioner filed a notice of appeal and furthermore sought a Certificate of Appealability from the court of appeals, contesting the district court's determination that Petitioner's Rule 60(b) Motion is, in fact, a "second or successive" habeas application. Respondent, by contrast, argued that the transfer order was not appealable. The Sixth Circuit entered two orders.

First, on January 18, 2002, the court of appeals entered an Order providing that "the application for a certificate of appealability is denied." Pet. App. A3. The Sixth Circuit held that "*[t]he district court properly found that a Rule 60(b) motion is the equivalent of a successive habeas corpus petition, see McQueen v. Scroggy, 99 F.3d 1302, 1335 (6th Cir. 1996)*, so it transferred this case to our court for a determination of whether the Rule 60(b) motion satisfied the gate[keeping] criteria of 28 U.S.C. § 2244(b)." *Id.* A2 (emphasis added).

As both Petitioner and Respondent have agreed throughout these proceedings, the gatekeeping criteria cannot provide Petitioner with any relief because his Rule 60(b) Motion raises only the claims in his initial petition. If it is a "second or successive" application, it must

therefore be dismissed as a matter of law under Section 2244(b)(1), which provides that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."

Without explanation, the Sixth Circuit nonetheless found "it * * * necessary to determine whether the petition meets the criteria of 28 U.S.C. § 2244(b)*(2)*" (Pet. App. A2 (emphasis added)), which governs "[a] claim * * * that was *not* presented in a prior application." Reciting the statutory language, the court held that Petitioner "has not been able to meet these criteria." *Id.* Petitioner did not satisfy Section 2244(b)(2)(A), regarding intervening legal developments, because "he does not rely upon a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." *Id.* Petitioner also did not satisfy Section 2244(b)(2)(B), regarding intervening factual developments, because "there is no factual predicate for the claim which could not have been discovered previously through the exercise of due diligence" and "he does not show that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found him guilty of the offense charged." *Id.* This was true, the Sixth Circuit explained, because the grounds raised by Petitioner's Rule 60(b) motion are purely *legal*, not factual: Petitioner relies on a new "state procedural rule"; the district court's original decision finding the TN Rule 39 Claims procedurally defaulted "properly found that the claims were then unexhausted for failure to present them before the Tennessee Supreme Court"; and "the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default." *Id.* A2-A3.

Second, on February 11, 2002, the court of appeals entered a further Order concluding that (despite its January 18 Order), it could not consider Petitioner's appeal and his request for a

COA. Rather, adopting Respondent's argument, the Sixth Circuit held that the transfer pursuant to 28 U.S.C. 1631 required it to decide the issue as an original, not appellate, matter. The court of appeals therefore provided: "The order construing an ostensible Rule 60(b) motion as an application for leave to file a second habeas corpus petition and transferring it to the court of appeals is not an appealable order in No. 01-6504 [the docket number of petitioner's appeal and request for a COA], which is therefore DISMISSED for lack of jurisdiction." Pet. App. B2.[5]

The Sixth Circuit then turned to (what it characterized as) Petitioner's "application for leave to file a second habeas corpus petition, as transferred to this court by the district court in No. 01-6487." Pet. App. B2. The court of appeals held that the application was "DENIED," based on the reasoning of its "opinion filed * * * on January 18, 2002" – *viz.*, that Petitioner could not satisfy the gatekeeping criteria of 28 U.S.C. 2244(b)(2) for intervening factual developments because his claims are purely legal: "'...the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default.'" *Id.* (alteration in original). *Id.*

In the same February 11 Order, the Sixth Circuit denied Petitioner's motion for rehearing from the prior appeal, again by a divided vote. Petitioner had filed that motion after this Court denied the 2001 Cert. Petition but before the court of appeals issued its mandate. The motion sought to have the case remanded for further consideration of TN Rule 39. See *infra* at 29-32 (detailing cases holding that courts of appeal may grant such relief). The Sixth Circuit continued

[5] The appealability of the district court's transfer order is irrelevant to this Court's jurisdiction. Once the Sixth Circuit itself decided the transferred case, its ruling was plainly reviewable in this Court.

the stay of its mandate while Petitioner's rehearing request was pending. When the court of appeals denied the rehearing request on February 11, it issued its mandate. See Pet. App. B2.[6]

4. This Petition for a Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

The Petition for a Writ of Certiorari should be granted for three reasons. *First*, the Sixth Circuit's holding that Petitioner's Rule 60(b) Motion is a prohibited "second or successive" habeas application conflicts with decisions of other circuits on an issue that has the potential to arise in essentially any habeas case. *Second*, the Sixth Circuit's decision conflicts with this Court's precedents, which hold that a petition is "successive" only if it seeks to raise new claims or seeks an adjudication of claims that have already been decided "on the merits." *Third*, the second question presented by this Petition – addressing whether this case should have been remanded for application of TN Rule 39 before the judgment against Petitioner became final – presents an important and recurring question of federal procedure: how the courts of appeals should apply critical intervening developments in state law.

I. The Circuits Are Irreconcilably Divided Over Whether And When A Rule 60(b) Motion Constitutes A "Second Or Successive" Habeas Application.

The Sixth Circuit applied a categorical rule that every Rule 60(b) Motion filed by a habeas petitioner constitutes a "second or successive" habeas application and therefore is subject to the extreme strictures of 28 U.S.C. 2244(b), which interposes the court of appeals as a gatekeeper and permits such applications to be filed only in exceedingly narrow circumstances. See 28 U.S.C. 2244(b)(1) ("A claim presented in a second or successive habeas corpus

[6] When the Sixth Circuit issued its mandate on the prior appeal on February 28, 2002, it for the first time entered a judgment against Petitioner. The court's contemporaneous ruling on the transferred motion (see *supra*) denied Petitioner relief from that judgment under Rule 60(b).

application under section 2254 that was presented in a prior application shall be dismissed."), 2244(b)(2) ("[a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless" certain very narrow exceptions are satisfied). The Sixth Circuit held that this case did not satisfy the gatekeeping criteria and therefore refused to permit the district court to consider Petitioner's Rule 60(b) Motion. Pet. App. A2, B2.

The Sixth Circuit's holding is the subject of an outcome-determinative, three-way circuit conflict. The Sixth Circuit is the *only* court to deem a Rule 60(b) motion a "second or successive" habeas petition in all circumstances, including those of this case. As this Petition explains *infra*, other circuits apply either of two approaches:

- The Second Circuit has adopted the *opposite* categorical rule, holding that a Rule 60(b) motion is *never* a "second or successive" application.

- Numerous other circuits hold that a Rule 60(b) motion "may" be deemed a "second or successive" application *if* it is the "functional equivalent" of a successive application because it presents new claims or seeks to relitigate claims that the district court has already decided on the merits, *neither* of which is true in this case.

Other circuits thus recognize that it would be completely absurd to hold that every Rule 60(b) motion is a "second or successive" application. Imagine a circumstance in which a district court is misled by the state into entering a judgment against a habeas petitioner, whether through outright "fraud" or more generally through "misconduct," both of which are expressly recognized as grounds for relief from judgment under Rule 60(b)(3). On the Sixth Circuit's view, if the petitioner discovers the fraud and files a Rule 60(b) motion, that motion is a "second or successive" application as a matter of law and, because it raises the same claims as the initial application, it categorically "shall be dismissed" under 28 U.S.C. § 2244(b)(1). That cannot conceivably be correct. Cf. *United States* v. *MacDonald*, No. 97-7297, 1998 U.S. App. LEXIS

22073 (CA4 Sept. 8, 1998) (holding that Rule 60(b) motion is not "second or successive" application when motion alleges that "prior petition had been denied based on fraud"); see also *infra* at 15-16, 18, 19 (citing numerous cases in which courts have found Rule 60(b) relief appropriate in habeas cases). The Sixth Circuit's holding also logically deems every motion under Rule 59(e) (governing any attempt "to alter or amend [a] judgment") to be a "second or successive" application, notwithstanding that district courts regularly invoke Rule 59(e) to correct their own errors. Nothing in the text of the AEDPA, its legislative history, or the policies it embodies suggests that Congress would intend such an unheard-of result. And for the reasons discussed *infra*, decisions of every other circuit and this Court flatly reject such a suggestion.[7]

1. The decision below squarely conflicts with the Second Circuit's decision in *Rodriguez* v. *Mitchell*, 252 F.3d 191 (2001). *Rodriguez* holds as a matter of law that "a motion under Rule 60(b) to vacate a judgment denying habeas is not the equivalent of a second or successive habeas petition subject to the standards of § 2244(b)." 252 F.3d at 194. See also *id.* at 198 ("We now rule that a motion under Rule 60(b) to vacate a judgment denying habeas is not a second or successive habeas petition and should therefore be treated as any other motion under Rule 60(b).").

The Second Circuit rested its categorical rule on two grounds. *First*, "[a] motion under Rule 60(b) and a petition for habeas have different objectives": "The habeas motion under 28

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[7] The Sixth Circuit's rule also makes no sense because it grants more favorable treatment to *new* claims – *i.e.*, claims raised for the first time in a "second or successive" application – than to claims that were raised in an initial application *but were never considered "on the merits"* for procedural reasons. Under long-standing habeas law, the former are seriously disfavored under the "abuse of the writ" doctrine while the latter are *permitted*. See *infra* at 24 (quoting Rule 9(b) of the former 28 U.S.C. 2254). The Sixth Circuit's rule, by contrast, provides that *new* claims may be considered through a Rule 60(b) Motion – because they may meet the gatekeeping criteria of Section 2244(b)(2) – while claims that the district court previously did not address on the merits are categorically forbidden by Section 2244(b)(1). Again, Congress cannot have intended that result.

U.S.C. § 2254 seeks to invalidate the state court's judgment of conviction," in contrast to a Rule 60(b) motion, which (although "a step on the road to the ultimate objective of invalidating the judgment of conviction") "seeks only to vacate the federal court judgment dismissing the habeas petition." 252 F.3d at 198. A successful Rule 60(b) motion would not "invalidat[e] the state conviction," but instead "would merely reinstate the previously dismissed petition for habeas, opening the way for further proceedings seeking ultimately to vacate the conviction." *Id.* *Second*, "the grounds asserted in support of the motion under Rule 60(b) may well have nothing to do with the alleged violations of federal rights during the state criminal trial that are asserted as a basis for the habeas." *Id.* at 199.

Of particular note, the Second Circuit specifically *acknowledged* that it was expanding a split in the circuits. "We are aware that the majority of circuit courts that have considered this issue have held that a Rule 60(b) motion to vacate a judgment denying habeas either *must* or *may* be treated as a second or successive habeas petition." 252 F.3d at 199-200 (emphasis added) (collecting cases). The Second Circuit explicitly rejected those decisions: "These courts, however, have offered little explanation in support of their reasoning. Their opinions depend largely on conclusory statements and citations to one another. In our view, better reasons support the conclusion that a Rule 60(b) motion to vacate a judgment denying habeas is not a second petition under § 2244(b)." *Id.* at 200.

The Second Circuit specifically rejected the view of other circuits that a Rule 60(b) motion "may" or "must" be deemed a second or successive petition because such a motion "contemplates ultimately the vacating of the conviction." 252 F.3d at 198. That objective, the court explained, "is shared with every motion the petitioner might make in the course of pursuing his habeas": "All such motions, like the motion under Rule 60(b), seek to advance the ultimate

objective of vacating the criminal conviction. But each seeks relief that is merely a step along the way." *Id.* at 198-99.

Of note, *even before Rodriguez*, district courts in the Second Circuit regularly granted Rule 60(b) motions to reopen habeas proceedings, rejecting the argument that such motions are successive applications.[8] Particularly noteworthy is a series of district court cases granting Rule 60(b) relief to individuals whose habeas petitions had been dismissed as untimely prior to the Second Circuit's adoption of a rule granting inmates whose convictions became final prior to AEDPA a one-year grace period following AEDPA's effective date to file petitions.[9]

Plainly, Petitioner would prevail in the Second Circuit as a matter of law. Under the square holding of *Rodriguez*, Petitioner's Rule 60(b) Motion is not a second or successive habeas application and the district court would be obligated to consider the Motion. Indeed, both Respondent and the district court candidly admitted as much, but Respondent persuaded the district court, and then the Sixth Circuit, that they were bound by Sixth Circuit precedent to reach a contrary result. See *supra* at 8-9.

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[8] *E.g.*, *Montalvo* v. *Portuondo*, No. 97 Civ. 3336 (RWS), 2001 U.S. Dist. LEXIS 10686, at *2 (S.D.N.Y. July 30, 2001) (petition reinstated following grant of habeas relief to petitioner's co-defendant when "the vast majority of the evidence relevant to [co-defendant's] habeas petition applies to [petitioner]"); *Diaz* v. *Garvin*, No. 92 Civ. 4778 (MBM), 1995 U.S. Dist. LEXIS 10777 (S.D.N.Y. Aug. 3, 1995) (noting that court had previously granted Rule 60(b) motion to vacate judgment denying habeas (because of failure to object to magistrate judge's recommendation) when delay in prison mail delivery prevented petitioner from objecting); *Rivera* v. *Leonardo*, No. 92 Civ. 1506 (PNL), 1993 U.S. Dist. LEXIS 10328, at *1 (S.D.N.Y. July 28, 1993) (court, which had previously dismissed habeas petition "without reaching the merits" because it "concluded that [petitioner] had not exhausted his state remedies," agrees with petitioner's argument in Rule 60(b) motion that avenue suggested to exhaust was inappropriate); *Elmore* v. *Henderson*, No. 85 Civ. 0579, 1989 U.S. Dist. LEXIS 8742 (S.D.N.Y. July 28, 1989) (grants Rule 60(b) motion requesting that district court vacate opinion denying habeas relief and re-enter judgment so that petitioner can file timely appeal when petitioner not notified of court's decision denying petition).

[9] See *Matos* v. *Portuondo*, 33 F. Supp. 2d 317 (S.D.N.Y. 1999); *Tal* v. *Miller*, No. 97 Civ. 2275 (JGK), 1999 U.S. Dist. LEXIS 652 (S.D.N.Y. Jan. 27, 1999); *Robles* v. *Senkowski*, No. 97 Civ. 2798 (MGC), 1999 U.S. Dist. LEXIS 11565 (S.D.N.Y. July 30, 1999); *Reinoso* v. *Artuz*, No. 97 Civ. 3174 (MGC), 1999 U.S. Dist. LEXIS 7768 (S.D.N.Y. May 25, 1999); *Liberatore* v. *McGuiness*, No. 96 Civ. 6943

2. Petitioner also would prevail in the many circuits that reject the Sixth Circuit's categorical rule that every Rule 60(b) motion is a "second or successive" habeas petition and instead hold that a district court "may" deem a Rule 60(b) motion a "second or successive" application in appropriate circumstances. As explained by the *en banc* Ninth Circuit, "[i]t suffices to say that a bright line rule equating all Rule 60(b) motions with successive habeas petitions would be improper." *Thompson* v. *Calderon*, 151 F.3d 918, 921 n.3 (1998).[10]

The rule in the Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits is thus that a Rule 60(b) motion "*may*," in certain specific circumstances, be deemed a "second or successive" application. Those courts focus on whether the Rule 60(b) motion seeks to evade the bar to successive applications by (i) raising new claims or evidence, or (ii) relitigating claims that have already been decided on the merits. See *Thompson* v. *Calderon*, *supra*, 151 F.3d at 921 (when petitioner relies on newly discovered evidence regarding already-decided claim, "the factual predicate for a Rule 60(b) motion also states a claim for a successive petition" and should be treated as such); *United States* v. *Rich*, 141 F.3d 550, 553 (CA5 1998) (district court "may" deem Rule 60(b) motion successive petition if "the functional equivalent of a motion under § 2255"; in that case, petitioner sought reconsideration of claim previously decided on the merits); *Felker* v. *Turpin*, 101 F.3d 657, 660 (CA11 1996) (deeming Rule 60(b) motion to be a prohibited application because it would be "tantamount to a second or successive petition" and "Rule 60(b) cannot be used to circumvent restraints or successive petitions"); *Mathenia* v. *Delo*, 99 F.3d 1476 (CA8 1996), *cert. denied*, 521 U.S. 1123 (1997) (holding that claims in Rule 60(b) motion

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(CLB), 1998 U.S. Dist. LEXIS 22842 (S.D.N.Y. Oct. 7, 1998); *Rashid* v. *Kuhlman*, No. 97 Civ. 3037 (RCC) (HBP), 2000 U.S. Dist. LEXIS 18212 (S.D.N.Y. Dec. 19, 2000).

[10] The Ninth Circuit's ruling is particularly significant because it came on the heels of this Court's prior ruling in the same case that a "motion to recall the mandate" cannot be categorically deemed a successive petition. See *infra* at 19-20.

"were successive because they raised 'grounds identical to grounds heard and decided on the merits in [the petitioner's] previous petition'" (quoting *Sawyer* v. *Whitley*, 505 U.S. 333, 338 (1992)); *Hunt* v. *Nuth*, 57 F.3d 1327, 1339 (CA4 1995) (district court "may" treat 60(b) motion as successive and properly did so when motion sought consideration of claims "omitted" from original petition and thus "were equivalent to additional habeas claims").

This case-by-case approach is illustrated by decisions applying it to grant habeas relief to petitioners under Rule 60(b). See, *e.g.*, *United States* v. *Brown*, 179 F.R.D. 323 (D. Kan. 1998) (granting Rule 60(b) relief to re-enter judgment because petitioner did not receive notice until a year later and thus could not otherwise appeal); *Whitmore* v. *Avery*, 179 F.R.D. 252, 258-60 (D. Neb. 1998) (adopting magistrate's report and recommendation; distinguishing appellate precedent denying Rule 60(b) relief as "second or successive" as turning on facts in which "the petitioner sought by his motion to present claims which either had not been presented before in his earlier petition, or had been presented and decided on the merits"; granting Rule 60(b) relief because order dismissing prior application was "erroneous").

The district court plainly would have been permitted to consider Petitioner's Rule 60(b) Motion in the Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits. Petitioner does not seek to raise any claims not presented in his initial habeas petition, nor does he seek to relitigate any claim that had been decided on its merits. Rather, he seeks to re-open the district court's earlier judgment to receive an adjudication of the claims that the district court held it could not consider on the merits because (on the court's erroneous presumption regarding the need to seek discretionary review in the Tennessee Supreme Court) those claims had been procedurally defaulted.

3. This circuit conflict furthermore merits review in this Court because of its unquestionable importance. Although the significance of this particular case is heightened because Petitioner is subject to an imminent sentence of death, the proper treatment of Rule 60(b) motions by habeas petitioners can arise in *any* capital or non-capital proceeding under Section 2254 *or* Section 2255. The numerous cases cited in this Petition to illustrate the lower courts' treatment of Rule 60(b) motions demonstrate that the question presented recurs frequently. Indeed, given that both district courts and courts of appeals regularly rule on habeas petitioners' Rule 60(b) motions without considering the implication of the statutory provisions governing "second or successive" petitions, compare *Todd* v. *Stegall*, No. 98-72656, 2000 U.S. Dist. LEXIS 12997 (E.D. Mich. Aug. 1, 2000) (granting relief), and *Evans* v. *Fulcomer*, No. 89-4999, 1990 U.S. Dist. LEXIS 7160 (E.D. Pa. June 13, 1990) (same) with *Waye* v. *Townley*, 884 F.2d 762 (CA4 1989) (per curiam) (denying relief); *May* v. *Collins*, 961 F.2d 74 (CA5 1992) (per curiam) (same); *Wenger* v. *O'Brien*, No. 00-1103, 2000 U.S. App. LEXIS 15487 (CA7 June 28, 2000) (same), only a decision by this Court can bring needed uniformity to the law.

Because the district court would have considered Petitioner's Rule 60(b) Motion under either the categorical rule of the Second Circuit or the case-by-case approach of the Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits, and because the question presented is important and recurs frequently, certiorari should be granted.

II. The Decision Below Conflicts With This Court's Precedents.

1. Certiorari also is warranted because the Sixth Circuit's determination that the Rule 60(b) Motion in this case constitutes a "second or successive" habeas application conflicts with this Court's precedents. *Calderon* v. *Thompson*, 523 U.S. 538 (1998), held that the Ninth Circuit abused its discretion in recalling its mandate on the facts of that case. Before reaching that

question, however, the Court first *rejected* the State's contention that the court of appeals had acted on the basis of a "second or successive" petition. This Court explained that a "motion to recall the mandate on the basis of the merits of the underlying decision *can* be regarded as a second or successive application for purposes of § 2244(b)," but made clear that the proper characterization of the motion "depend[s] on the underlying basis of the court's action." 523 U.S. at 553-54 (emphasis added). The Court announced the following standard: If "the court considers *new claims or evidence* presented in a successive application for habeas relief, it is proper to regard the court's action as based on that application." *Id.* at 554 (emphasis added). Because the court of appeals in *Calderon* "was specific in reciting that it acted on the exclusive basis of [the petitioner's] first federal habeas petition," and that recitation was accurate, this Court held that the Ninth Circuit's decision did not rest on a "second or successive" application. *Id.* Indeed, the Court's holding in that regard was unanimous. See *id.* at 566 (Souter, J., dissenting).

Just a few weeks later, *Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998), held (by a seven-to-two majority) that a motion to reopen claims that the district court had previously held to be unripe is *not* a "second or successive" application. The district court in that case initially granted the petitioner habeas corpus relief on one claim but dismissed another claim – that he was incompetent to be executed under *Ford* v. *Wainwright*, 477 U.S. 399 (1986) – as premature. The court of appeals reversed the grant of relief. Subsequently, the petitioner filed a motion in the district court "to reopen his *Ford* claim," which the district court deemed an impermissible "second or successive" petition.

This Court rejected the district court's conclusion. In particular, the Court rejected the State's arguments that a habeas petitioner "is entitled to only one merits judgment on his federal

habeas claim" and that, because the petitioner in that case had "already had one 'fully-litigated habeas petition, the plain meaning of § 2244(b) as amended requires his new petition to be treated as successive.'" 523 U.S. at 643 (quoting Pet'r Br. 12)). The State's error, the Court explained, was its failure to recognize that "the only claim on which respondent now seeks relief is the *Ford* claim that he presented to the District Court, along with a series of other claims, in [his previous application]":

> This may have been the second time that respondent had asked the federal courts to provide relief on his *Ford* claim, but this does not mean that there were two separate applications, the second of which was necessarily subject to § 2244(b). *There was only one application for habeas relief*, and the District Court ruled (or should have ruled) on each claim at the time it became ripe. *Respondent was entitled to an adjudication of all the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief.*

Id. at 643-44 (emphasis added). The Court thus distinguished the case before it from "the situation where a prisoner raises a *Ford* claim for the first time in a petition filed after the federal courts have already rejected the prisoner's initial habeas application." *Id.* at 645 n.*.

The Court found particularly persuasive an analogy to the proper treatment of habeas applications that are dismissed for failure to exhaust state remedies, but are subsequently re-filed. In that circumstance, the subsequently filed petition is not "successive." 523 U.S. at 644. The Court concluded that a claim previously dismissed on procedural grounds "should be treated in the same manner as the claim of a petitioner who returns to a federal habeas court after exhausting state remedies." The *critical* factor for the Court was that "in both situations, the habeas petitioner *does not receive an adjudication of his claim*. To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons *would bar the prisoner from ever obtaining federal habeas review*." *Id.* at 645 (emphasis added).

This Court subsequently applied *Martinez-Villareal* to hold (by the same seven-to-two majority) in *Slack* v. *McDaniel*, 529 U.S. 473 (2000), that a re-filed petition for habeas corpus raising claims that were previously dismissed for failure to exhaust is not a "second or successive" habeas petition. "A habeas petition filed in the district court after an initial habeas petition was *unadjudicated on its merits* and dismissed for failure to exhaust state remedies is not a second or successive petition." 529 U.S. at 485-86 (emphasis added). Of note, even the two dissenters in *Slack* thought it "quite plausible" to read this Court's precedents not to deem a habeas petitioner's attempt to pursue the *same* claims that the district court previously refused to consider on the merits a "second or successive petition" because such a step "is just a renewal of the first petition." *Id.* at 491. The dissenters believed it impermissible, however, to permit the petitioner to proceed on claims that were not raised in his initial application. *Id.*

2. The Sixth Circuit's holding that Petitioner's Rule 60(b) Motion was a prohibited "second or successive" application is totally irreconcilable with this Court's decisions in *Calderon* v. *Thompson*, *Martinez-Villareal*, and *Slack* v. *McDaniel*. Those decisions cannot possibly be said to turn on the particular procedural vehicles that the petitioners in those cases employed to secure a ruling on the merits of their claims. This Court's decisions thus eschew reliance on the label attached to the filing said to be successive. *E.g.*, *Calderon* v. *Thompson*, 523 U.S. at 553-54. Indeed, in both *Martinez-Villareal* and *Slack*, the petitioner literally filed a "second" "application" (in the sense that each filed an application for a second time), but this Court nonetheless held that the application was not "second or successive" for purposes of Section 2244. It would take an extraordinary rhetorical stretch to nonetheless convert Petitioner's Rule 60(b) Motion, which contains no affirmative claims for relief *at all*, into a "successive" "application." Thus, it is clear that if a habeas petitioner files a Rule 60(b) motion

to seek consideration of claims that the district court previously deemed unripe (as in *Slack*) or unexhausted (as in *Martinez-Villareal*), that motion is *not* a "second or successive" application.[11]

The proper inquiry under this Court's precedents is accordingly whether (a) the petitioner seeks to present "new claims or evidence" and, if not, (b) whether the district court previously considered those claims on the merits. When, as in this case, "the only claim[s] on which [the petitioner] now seeks relief [are those] that he presented to the District Court, along with a series of other claims, in [his original application]," and the petitioner "[did] not receive an adjudication of his claim[s]," the "successive application" provisions are inapplicable. *Stewart* v. *Martinez-Villareal*, 523 U.S. at 643, 645. In this case, it is undisputed that *neither* of those criteria applies. Moreover, the analogy that this Court found compelling in *Martinez-Villareal* has even greater force in these circumstances. *Martinez-Villareal* explained that a petition which is re-filed after having been dismissed for failure to exhaust state remedies is not "successive," then concluded that the same rule should apply to claims that are re-filed after having been dismissed by the district court as unripe. 523 U.S. 644-45. Here, the analogy to the exhaustion doctrine is even more direct. The district court refused to consider the TN Rule 39 claims because Petitioner had "failed to exhaust" those claims; it held them "procedurally defaulted" only "because Petitioner has no remedy currently available in state court." Pet. App. E16.

3. The Sixth Circuit's holding should be rejected for the further reason that it raises a grave question under the Constitution's Suspension Clause, Art. I, § 9, cl. 2. Here, as in *INS* v. *St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271, 2279 n.13 (2001), "The fact that this Court would be

[11] At bottom, this Court's precedents illustrate that the lower courts in this case were misguided in focusing on the procedural mechanism Petitioner invoked – Fed. R. Civ. P. 60(b) – rather than on the substance of the relief he requested. Under *Martinez-Villareal* and *Slack* v. *McDaniel*, Petitioner would have been perfectly entitled to seek relief by filing an entirely separate habeas application limited to the TN Rule 39 Claims, because those claims had been raised before but never decided on their merits.

required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely." Because a determination that Congress intended to repeal the authority of federal courts to consider the merits of a federal constitutional claim on habeas corpus would raise "a serious and difficult constitutional issue," this Court requires "a clear and unambiguous statement" of congressional intent. 121 S. Ct. at 2282.

The Sixth Circuit's decision directly implicates the Suspension Clause because it not only categorically precludes any district court from considering the merits of Petitioner's claims but similarly would appear to prohibit any court of appeals and even *this Court* from considering them as well. In other words, on the Sixth Circuit's view, Section 2244 prevents Petitioner from seeking relief in *any forum*. The bar to considering "successive petitions" thus appears to apply to all writs of habeas corpus, including those issued by this Court and its Justices, because those writs are issued pursuant to 28 U.S.C. 2254. See 28 U.S.C. 2244(b)(1) (any "second or successive" petition under Section 2254 presenting same claims as initial petition must be dismissed). The Sixth Circuit's decision thus crosses the line drawn by this Court in *Felker* v. *Turpin*, 518 U.S. 651 (1996). *Felker* sustained AEDPA's successive petition provisions as applied in that case to interpose the court of appeals as a gatekeeper, leaving this Court's power to grant original writs of habeas corpus intact, as "within the compass of [the] evolutionary process" of this Court's "abuse of the writ" jurisprudence. 518 U.S. at 664. By contrast, as authoritatively construed by the Sixth Circuit in this case, AEDPA represents a complete break from the "abuse of the writ" doctrine, prohibiting consideration on habeas of claims that have never been addressed "on the merits." Compare Rule 9(b), Rules Governing Habeas Corpus

Proceedings (pre-AEDPA) ("A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief *and the prior determination was on the merits* * * *." (emphasis added)).[12]

Because the Sixth Circuit's holding that Petitioner's Rule 60(b) Motion is a "second or successive" application conflicts with this Court's precedents, certiorari should be granted.[13]

III. If This Court Agrees That Petitioner's Rule 60(b) Motion Is A Prohibited "Second Or Successive" Application, Then The Sixth Circuit Abused Its Discretion By Failing To Remand This Case To The District Court For Application Of TN Rule 39.

1. If this Court holds that Petitioner was not entitled to pursue the TN Rule 39 Claims through his Rule 60(b) Motion, that does not end the matter. Question 2 presented by this Petition seeks review of the court of appeals' failure to remand this case to the district court for further consideration in light of the Tennessee Supreme Court's promulgation of Rule 39. Certiorari is warranted on that question because the lower courts are often presented with critical intervening developments of state law while a case is pending, but have not applied uniform rules in accounting for those developments. In addition, Questions 1 and 2 presented by this Petition are closely bound together because any adverse ruling on the Rule 60(b) issue will likely

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[12] For similar reasons, the Sixth Circuit's holding raises serious questions under the Due Process Clause and Article III of the Constitution, including the Exceptions Clause. Petitioner also maintains that, if he is not permitted to pursue any of the avenues of relief he asserts – a Rule 60(b) Motion, a remand by the court of appeals, or an extraordinary writ from this Court – then the provisions of the AEDPA relating to "second or successive" habeas corpus applications violate the Suspension and Due Process Clauses of the Constitution.

[13] Even if Petitioner's Rule 60(b) Motion were a "second or successive" habeas application, the Sixth Circuit nonetheless erred in furthermore holding that it was prohibited under AEDPA. See Pet i (Question 1). The proceedings on appeal in this case were governed by AEDPA. See *Slack* v. *McDaniel*, *supra*. But the proceedings *in the district court*, where the Motion was filed, were governed by pre-AEDPA law because AEDPA is not retroactive. See *Lindh* v. *Murphy*, 521 U.S. 320 (1997); see also *Coss* v. *Lackawanna County, DA*, 204 F.3d 453, 461 (CA3 2000) (en banc) (when "all the claims" in later application were "asserted in a petition filed prior to AEDPA's effective date," "pre-AEDPA requirements govern"), *rev'd on other grounds*, 532 U.S. 394 (2001).

turn on the fact that Rule 60(b) motions are generally filed after a case becomes "final," an event that has special significance in the habeas context. Such a ruling would leave open, however, the proper disposition of a case, such as this one, in which the grounds for the motion arose and were invoked before finality attached.

Petitioner sought a remand when the case returned to the Sixth Circuit after this Court denied certiorari as to the 2001 Cert. Petition, but before the court of appeals issued its mandate. In other words, Petitioner requested a remand (just as he filed his Rule 60(b) Motion) *before* a final judgment was entered against him.

The Sixth Circuit's refusal to remand this case constituted a grave abuse of discretion for the straightforward reason that the court of appeals, immediately prior to denying the remand, held that Petitioner had *no avenue* to pursue the TN Rule 39 claims in district court. In other words, through no fault of his own, Petitioner would be denied any opportunity to have his claims considered "on the merits." Petitioner is uniquely entitled to such extraordinary relief because a determination that Petitioner is forbidden from pursuing the TN Rule 39 claims would contravene fundamental premises animating the writ of habeas corpus. Decisions such as *Martinez-Villareal* and *Slack* v. *McDaniel*, *supra*, reiterate the basic premise of the writ of habeas corpus – that a state prisoner is entitled to have his claims of federal constitutional violations considered once "on the merits." Manifestly, that premise takes on even greater significance when, as in this case, the prisoner has been sentenced to death and a federal district court (by finding extraordinary prejudice from the failure of his counsel to present *any* mitigating

evidence at sentencing) has already called that sentence squarely into doubt on federal constitutional grounds.[14]

To be sure, other precedents establish an important competing premise in habeas jurisprudence – that the prisoner is entitled to have his claims considered on the merits only if he properly presents those claims to the state courts. This Court recently explained the basis of the exhaustion doctrine as follows:

> The exhaustion requirement of § 2254(b) ensures that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment. This requirement "is principally designed to *protect the state courts' role* in the enforcement of federal law and prevent disruption of state judicial proceedings." The exhaustion rule promotes comity in that "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation."

Duncan v. *Walker*, 533 U.S. 167, 178-79 (2001) (quoting *Rose* v. *Lundy*, 455 U.S. 509, 518-19 (1982) (emphasis added)). As applied to this case, the district court relied on a presumption, *intended to protect the interests of the Tennessee Supreme Court*, that a petition for discretionary review to a state supreme court is an available means of "exhausting" state remedies for purposes of federal habeas corpus. On that view, because Petitioner did not sufficiently present the TN Rule 39 Claims in an application for discretionary review to the Tennessee Supreme Court, those claims were not exhausted and thus were defaulted.

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[14] Petitioner recognizes, of course, that a divided panel of the Sixth Circuit reversed that decision and this Court, upon Respondent's objection that the case was fact-bound, denied certiorari. Petitioner's point is that the district court's finding of a constitutional violation, at the very least, raises substantial doubts about the propriety of his death sentence. The district court reached that conclusion only after hearing and considering an extraordinary array of evidence, and furthermore producing an exceedingly detailed opinion explaining the basis for its conclusions. See Pet. App. E1-E59. The Sixth Circuit majority reversed that factual determination *sua sponte*, without any briefing or argument, and with only two sentences of explanation. See *supra* at 6. In addition, Respondent has never contested that the panel majority's opinion was *rife* with legal and factual errors. See Pet. App. H18-H19.

But when a habeas petitioner *has* properly presented his claims, *Martinez-Villareal* and *Slack* v. *McDaniel* establish that the prisoner's right to vindicate his federal constitutional claims a single time on the merits in federal court through federal habeas – a right established both by the Constitution and by federal law – takes precedence. In this case, the asserted basis for forbidding Petitioner from vindicating the TN Rule 39 Claims on the merits – the exhaustion doctrine – is precisely the subject of his Rule 60(b) Motion. The Tennessee Supreme Court has categorically and unambiguously established that the Tennessee courts deem "denial of relief by the Court of Criminal Appeals * * * exhaustion of state remedies for federal habeas corpus." TN Rule 39. Thus, no interest in "comity" or the "state courts' role" (*Duncan* v. *Walker*, *supra*) is served by refusing to permit the district court to consider Petitioner's Rule 39 Claims on the merits for the first time. The only effect of such a prohibition is to disserve profoundly the long-standing interests protected by the venerable writ of habeas corpus.

Furthermore, the constitutional claims presented by Petitioner's Rule 60(b) Motion are indisputably substantial. The assistant district attorney who prosecuted Petitioner's capital case has a well-documented history of serious misconduct. See Pet. App. J1-J4. In Petitioner's case, this prosecutor engaged in a fraudulent and deceptive scheme of withholding evidence and making misrepresentations. As outlined in Appendix I, the prosecutor's misconduct included: the withholding of exculpatory (*Brady*) material and information; misleading statements to defense counsel concerning the crucial forensic blood evidence in the case, thereby raising doubt about whether Petitioner was the actual assailant; fraudulent and prejudicial misrepresentations to the state mental health evaluators regarding the circumstances of the offense and Petitioner's mental state and background; fraudulent and prejudicial misrepresentations to defense counsel about the nature of Petitioner's prior murder conviction; improper presentation of inadmissible

and prejudicial evidence to the jury at trial, which the Tennessee Supreme Court previously characterized as "border[ing] on deception" (*State* v. *Jones*, 789 S.W.2d 545, 552 (Tenn. 1990)); improper coaching and manipulation of witnesses; and improper jury argument that the prosecutor must have known was false based on information contained in his own files. As a consequence of the prosecutorial misconduct, especially when combined with the deficient performance of defense counsel, the state presented a prejudicially false and misleading case to the jury.

2. Particularly relevant for purposes of this Court's certiorari determination, the question of when a court of appeals abuses its discretion in refusing to grant rehearing and remand the case for consideration of a critical question of law, while broadly important, cannot give rise to a circuit conflict because, by definition, it can be considered only in this Court in the first instance. This Court apparently granted certiorari in *Calderon* v. *Thompson*, *supra*, to consider a similar issue based on the question's broad importance. The same rationale justifies certiorari as to Question 2 in this case.

It nonetheless bears noting that the Sixth Circuit's refusal to grant rehearing and remand cannot be reconciled with decisions of other circuits granting similar relief in far less compelling circumstances. Those courts apply the principle that a case must be decided according to the law as it then exists, including by accounting for intervening developments. Here, by contrast, the Sixth Circuit refused to remand the case and issued its mandate despite the vital intervening development of TN Rule 39. Thus, as long ago as *Alphin* v. *Henson*, 552 F.2d 1033 (per curiam), *cert. denied*, 434 U.S. 823 (1977), the Fourth Circuit considered a motion for leave to file a second petition for rehearing filed by the plaintiffs in an antitrust action alleging monopolization at the Hagerstown, Maryland regional airport. The plaintiffs had obtained

injunctive relief from the district court but – because they could not prove damages – had been unsuccessful in their claim for attorney's fees. The plaintiffs appealed the denial of the attorney's fees to the Fourth Circuit, which affirmed the denial but stayed the issuance of its mandate while plaintiffs filed for certiorari. While plaintiffs' petition for certiorari was pending in this Court, the President signed the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which, *inter alia*, provided for the award of attorney's fees in antitrust cases in which "the plaintiff substantially prevails." 552 F.2d at 1034. This Court denied certiorari, but plaintiffs filed a motion for leave to file a second petition for rehearing in the court of appeals, based on the changes effected by the Hart-Scott-Rodino Act, before the Fourth Circuit received the order denying certiorari.

The Fourth Circuit stayed its mandate to consider plaintiffs' second petition for rehearing. Acknowledging that the plaintiffs would have been entitled to attorney's fees if the Hart-Scott-Rodino Act had been in effect when the district court issued its opinion, the court of appeals explained that "[i]t is an established principle 'that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.'" 552 F.2d at 1034 (quoting *Bradley* v. *Richmond Sch. Bd.*, 416 U.S. 696 (1974)). The court concluded that its previous decision, in which it affirmed the denial of attorney's fees, was "not final" and should be amended "to make it conform to the law which now exists." *Id.* at 1035. It therefore granted both the plaintiffs' motion for leave to file a second petition for rehearing and their petition for rehearing, withdrew its earlier opinion, and "reverse[d] that portion of the district court's judgment and remand[ed] the case with directions to grant appropriate attorneys' fees in accordance with the 1976 Act." *Id.* at 1036.

The Ninth Circuit adopted a similar course in *Bryant* v. *Ford Motor Co.*, 886 F.2d 1526 (CA9 1989), *cert. denied*, 493 U.S. 1076 (1990), a product liability case initially brought in a California state court against Ford and various unnamed defendants. Ford had removed the case to federal court, where a district judge granted Ford's motion for summary judgment. Relying on Ninth Circuit precedent holding that the presence of unnamed defendants defeated diversity jurisdiction, the court of appeals overturned the grant of summary judgment on the ground that the district court lacked subject matter jurisdiction to enter summary judgment. *Id.* at 1527. The court of appeals stayed its mandate while Ford filed a petition for certiorari, which this Court granted in October 1988. In November 1988, the removal statute was amended to provide that the presence of unnamed defendants did not defeat jurisdiction. This Court subsequently vacated its order granting certiorari and denied Ford's petition.

Following the denial of certiorari, but prior to the Ninth Circuit's receipt of this Court's order, Ford filed a motion to stay the mandate, followed by a motion to extend the stay of the mandate and vacate the Ninth Circuit's earlier decision overturning the grant of summary judgment in Ford's favor. The Ninth Circuit granted Ford's motion and vacated its earlier opinion. It explained that

> Congress's action while this case was pending on certiorari justifies a stay of the mandate, and we choose to exercise our discretion to do just that in this case. Congress's enactment of the Act after the Supreme Court had granted certiorari conceivably deprived Ford of its day in court before the Supreme Court. . . . Justice demands that Fords' [*sic*] arguments for the affirmance of the district court's summary judgment receive a judicial forum.

Id. at 1530; see also *First Gibraltar Bank* v. *Morales*, 42 F.3d 895,897 (CA5 1995) (per curiam) (in case regarding preemptive effect of federal banking laws, vacating earlier opinion reversing district court judgment and issuing new opinion affirming judgment in accordance with new federal statute issued shortly before this Court denied certiorari; court explained that its

"mandate has not yet issued in this appeal, and 'the normal rule in a civil case is that we judge it in accordance with the law as it exists at the time of our decision'" (quoting *Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 247 (1982))).[15]

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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March 18, 2002

[15] This Court's decision in *Calderon* v. *Thompson*, *supra*, is not to the contrary. That case involved a court of appeals' *recall* of its mandate to "revisit the *merits* of its earlier decision denying habeas relief." 523 U.S. at 557. Once the merits have been decided and the mandate has issued, the Court concluded, "the State is entitled to the assurance of finality" (*id.* at 556) unless the petitioner could make "a strong showing of actual innocence" (*id.* at 558). Here, by contrast, Petitioner neither sought to recall the mandate (which had not issued) nor to have the lower courts reconsider the merits of his claims (which, for procedural reasons, had never been considered).